U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: **MAY 0 8 2015** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before us on motion to reconsider. We will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a radiologist. At the time he filed the Form I-140, Immigrant Petition for Alien Worker, the petitioner was a fellow at [redacted] North Carolina. He later accepted an assistant professorship at the [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. In our appellate decision, we upheld the director's determination.

On motion, the petitioner submits a brief. The petitioner requests that we reconsider the matter and rescind the October 10, 2014 decision dismissing the appeal.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano,* 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that he seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he will serve the national

interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

In the October 10, 2014 decision dismissing the petitioner's appeal, we determined that the petitioner had failed to establish eligibility for the national interest waiver. Although the petitioner has shown that he seeks employment in an area of substantial intrinsic merit and that the proposed benefits of his medical research are national in scope, we upheld the director's determination that petitioner's impact and influence on his field did not satisfy the third prong of the *NYSDOT* national interest analysis. Specifically, the record did not contain independent evidence showing that the petitioner's work has affected the way that other radiologists practice medicine or that his work has otherwise influenced the field as a whole.

On motion, the petitioner states:

> PERM [the permanent labor certification program] . . . does not account for or allow for someone of the Petitioner's expertise to be permanently employed at [redacted] or any other academic medical center for that matter. . . . If Petitioner were to be required to have his employer comply with the labor certification process, such a process would be futile as the petitioner would be the only individual with the skills and training required by the sponsoring employer.

The petitioner expresses his concern that complying with the labor certification "process would be futile." The national interest waiver, however, is not just a means for employers (or self-petitioning individuals) to avoid the labor certification process. *Id.* at 223. The inapplicability or unavailability of a labor certification is not alone sufficient to demonstrate eligibility for a national interest waiver; the petitioner still must demonstrate that he will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n.5. Any waiver must rest on the petitioner's individual qualifications, rather than on the circumstances that prevented [redacted] from filing a petition on his behalf.

The petitioner mentions "his skills as a highly trained clinician, medical educator, and researcher" and asserts that "[v]ery few individuals have [his] specialized combination of research and clinical training, teaching ability, and expertise." In addition, the petitioner mentions his clinical expertise "across the spectrum of sub-specialized radiology," his "research background with published research results," and his instructional knowledge as a faculty radiologist. Special or unusual knowledge or training, however, does not inherently meet the national interest threshold. *Id.* at 221. Any assertion that the petitioner possesses useful skills, or a "unique background" relates to whether similarly-trained workers are available in the United States and is an issue under the jurisdiction of the U.S. Department of Labor through the labor certification process. *Id.* With regard to meeting the third prong of the *NYSDOT* national interest analysis, there is no evidence showing the extent of the petitioner's impact and influence on the field of radiology. For example, there is no documentary evidence demonstrating that the petitioner's published research is frequently cited by others in the field, that his work as an educator has had an impact beyond the medical trainees he

instructs, or that his work has otherwise affected the field as a whole. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner also mentions his oncoradiology fellowship at his musculoskeletal imaging and body imaging fellowships at and his cardiovascular imaging fellowship at In addition, the petitioner asserts that "he gained his experiencing [sic] as an attending radiologist and also clinical educator to [ ] medical students, residents and fellows at the" With regard to the petitioner's radiology training and experience, any objective qualifications which are necessary for the performance of the occupation can be articulated in an application for labor certification. *Id.* at 220-221. Although the record establishes that the petitioner has completed several fellowships, thereby obtaining detailed knowledge of various subspecialties within radiology, there is no documentary evidence showing that the petitioner has developed diagnostic or treatment protocols that have improved patient outcomes at a meaningful number of medical treatment centers, that his original work has affected the way other radiologists in the field practice medicine, that his instructional methodologies have been integrated into radiology training programs at various universities or medical institutions, or that his work has otherwise influenced the field as a whole.

The petitioner further states:

> The AAO's decision rests heavily on Petitioner's research and the radiological research contributions he has made including publications, citations, presentations etc. This characterization that the Petitioner is a one dimensional research based radiologist is mistaken. If indeed the focus rested on the research component of the Petitioner's career and accomplishments then clearly the TSC [Texas Service Center] and AAO have missed the scope of Petitioner's contributions to the national interest.

Our appellate decision addressed the submitted evidence and the petitioner's assertions that were provided at the time of filing, in response to the director's request for evidence, and on appeal. The petitioner's motion does not identify any documentary evidence of "contributions to the national interest" in the field of radiology that our appellate decision and the director's decision failed to consider. Although the petitioner has received extensive training in his field, the record does not contain documentary evidence showing that he has utilized his training to influence the field of clinical radiology as a whole or to make contributions that are national in scope.

The petitioner asserts that he "far exceeds the any [sic] qualifications the average U.S. radiological fellow might have," but he offers no baseline for comparison to U.S. workers in the radiology field. The petitioner's uncorroborated assertion does not establish that he meets the *NYSDOT* guidelines for the national interest waiver. By the plain language of section 203(b)(2)(A) of the Act, a foreign worker is generally subject to the job offer requirement (including labor certification) even if that worker's employment "will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." Exceptional ability, defined at 8 C.F.R. § 204.5(k)(2) as "a degree of expertise significantly above that ordinarily encountered" in a given

field, is not automatic grounds for granting the waiver. Similarly, a radiologist with extensive fellowship training that reflects a degree of expertise significantly above that ordinarily encountered in the field of radiology would not, without evidence of national impact or influence, qualify for the waiver. Absent evidence demonstrating that the petitioner's work has affected the field as a whole, employment in a beneficial occupation such as a radiologist, therefore, does not by itself qualify the petitioner for the national interest waiver.

The petitioner asserts that he "has provided contributions to the national interest and at a substantially greater degree" than others in the field, but there is no documentary evidence demonstrating the national scope of his contributions or that his work has otherwise influenced the field of radiology as a whole. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

In conclusion, the record does not establish that the petitioner's work has affected the field as a whole or that he will otherwise serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. The petitioner has not shown that his past record of achievement is at a level sufficient to waive the job offer requirement which, by law, normally attaches to the visa classification he seeks. Accordingly, the petitioner's motion does not overcome the grounds underlying our previous findings.

ORDER: The motion to reconsider is dismissed, our October 10, 2014, decision is affirmed, and the petition remains denied.